

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RAKESH JAIN	:	DETERMINATION
	:	DTA NO. 814024
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and the New York City	:	
Administrative Code for the Year 1990.	:	

Petitioner, Rakesh Jain, 81-26 Kent Street, Jamaica Estates, New York 11432, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1990.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion dated October 20, 1995 seeking summary determination in the above-referenced matter pursuant to section 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, Rakesh Jain, pro se, responded by letter dated December 13, 1995. Accordingly, the 90-day period for the issuance of this determination pursuant to section 3000.5(d) of the Rules commenced on December 13, 1995. Based upon the motion papers, the affidavits submitted therewith and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's request for a conciliation conference was properly denied as untimely filed.

FINDINGS OF FACT

1. The subject of the instant matter is a Notice of Deficiency dated June 13, 1994, and addressed to petitioner, Rakesh Jain, at "260 Elkton Rd #15, Newark, DE 19711-4551". The notice asserts \$238.00 in additional income tax due for the year 1990, plus penalty and interest,

for a total amount due of \$675.14. The notice lists an assessment identification number of L-008742116-4 and also bears a certified mail control number of P 911 006 751. Additionally, under the heading "Explanation and Instructions" the notice states, "The original notice sent to you on 05/02/94 showed the detailed computation of the additional amount due."

2. By letter dated May 3, 1995, petitioner requested a conciliation conference regarding the subject Notice of Deficiency. Said letter was mailed to the Division in an envelope bearing a US Postal Service postmark dated May 4, 1995 and stated:

"I am responding to the NOTICE OF DEFICIENCY (a copy of which is enclosed). I have written to you several times but have not received a reply. I have moved to New York, and am currently at above address. Please forward me a copy of original notice sent to me on 05/02/94 that showed the detailed computation of additional amount due. I did not receive that notice. I wish to request a Conciliation Conference, regarding the matter. Please reply promptly."

3. By a Conciliation Order (CMS No. 147810) dated June 9, 1995 the Bureau of Conciliation and Mediation Services (BCMS) dismissed petitioner's request as late filed.

4. In order to establish the date and method of mailing of the subject Notice of Deficiency, the Division introduced an affidavit made by one Geraldine Mahon, who is employed as the Principal Clerk in the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. Ms. Mahon's duties include supervising the processing of notices of deficiency/determination such as the one at issue herein. Ms. Mahon's affidavit describes the general or regular process involved in the computer generation of notices of deficiency/determination and the subsequent mailing of such notices. More specifically, Ms. Mahon's affidavit describes the computer preparation of notices of deficiency/determination to include the preparation of a certified mailing record. The certified mailing record is a fan-folded (connected) computer-generated document entitled "Assessments Receivable, Certified Record for Zip+4 Minimum Discount Mail" consisting, in this case, of 44 pages. The certified mailing record lists those taxpayers to whom notices of deficiency are being mailed and also includes, for each such notice, a separate certified control number. The pages of the certified mailing record remain connected to each other before and after acceptance of the notices by the

United States Postal Service through return of the certified mailing record to the CARTS Control Unit.

5. As described in the Mahon affidavit, each computer-generated notice of deficiency is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the certified mailing record under the heading "Certified No.". The affidavit describes the certified mailing record as carrying an initial date (the date of its printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the certified mailing record is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case page 1 of the certified mailing record lists an initial date of June 1, 1994, which has been manually changed to June 13, 1994.

6. Attached as an exhibit to Ms. Mahon's affidavit in this case is a copy of the 44-page certified mailing record listing, inter alia, the notice at issue herein. The certified mailing record in this case lists consecutive certified control numbers P 911 006 322 through P 911 006 801, inclusive. Each such certified control number is assigned to an item of mail listed on the 44 pages of the certified mailing record. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. The certified mailing record herein lists 480 items of mail corresponding to the 480 certified control numbers listed thereon and there are no deletions from the list.

7. Information regarding the Notice of Deficiency at issue is contained on page 40 of the certified mailing record. Specifically, corresponding to certified control number P 911 006 751 is notice number L 008742116, along with information listing petitioner's name and address, which is identical to that listed on the subject Notice of Deficiency. It is noted that the notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the certified mailing record for purposes of compliance with statutory privacy requirements.

8. Each page of the certified mailing record bears a US Postal Service postmark. Except for pages 17, 32, 35, 40, 42, and 43, the date of the postmark, i.e., June 13, 1994, is legible. With respect to the six pages referred to above while there is a postmark on those pages it is too faint on the copy of the certified mailing record submitted with the Division's motion papers to be completely legible. With respect to page 40, the stamp indicates a numeric date of 13, although the month and year are illegible. Ms. Mahon's affidavit indicates that a Postal Service employee affixed a US Postal Service postmark dated June 13, 1994 to each page of the certified mailing record.

9. In addition to bearing a Postal Service postmark dated June 13, 1994, the last page of the certified mailing record, page 44, indicates "total pieces" listed thereon of 480. This figure has been manually circled and beneath it is what appears to be a signature. Ms. Mahon's affidavit states that the Postal Service employee circled the "total pieces" and signed page 44 to indicate that all 480 pieces were received at the post office.

10. Appearing immediately beneath the "total pieces" listing is the confirmatory listing "Total Pieces Received at Post Office". No information appears after this listing. However, as noted previously, the certified mailing record shows no indications of any deletions therefrom.

11. The Mahon affidavit notes finally that the Division does not request, demand, or retain return receipts from certified or registered mail.

12. The Division also submitted an affidavit made by one Daniel B. LaFar, who is employed as a Principal Mail and Supply Clerk in the Division's Mail and Supply Room ("mailroom"). Mr. LaFar's duties include supervising mailroom staff in delivering outgoing mail to branch offices of the US Postal Service. The LaFar affidavit provides that after a notice is placed in the mailroom's "Outgoing Certified Mail" basket, a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A mailroom clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the certified mailing record. Thereafter, a mailroom employee delivers the stamped envelopes and the associated certified mailing record to the Roessleville Branch of the US

Postal Service in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark and/or his signature to the certified mailing record. In the ordinary course of business a mailroom employee picks up the certified mailing record from the post office on the following day and returns the certified mailing record to the originating office (CARTS Control) within the Division.

13. The Division also submitted the affidavit of one Monica Amell, who is employed as a Senior Mail and Supply Clerk in the Division's Registry Unit. As part of her duties, Ms. Amell prepares US Postal Service Form 3811-A for mailing. According to Ms. Amell's affidavit and the relevant portion of the Domestic Mail Manual, Issue 48, dated 1/1/95 (a copy of which was attached thereto), the Postal Form 3811-A is a form used by the mailer to request return receipts after mailing. A Form 3811-A is sent to the post office where the piece of mail in question was delivered. The delivery post office then completes the form by providing the mailer the delivery date and the name of the individual or organization that postal delivery records show received the mail. Form 3811-A does not provide the mailer with the recipient's signature.

14. Attached to Ms. Amell's affidavit is the Form 3811-A which was requested for petitioner herein. Ms. Amell prepared the form in question and mailed it on September 13, 1995. Part of the Form 3811-A is completed by the mailer, i.e. the Division. In this case, box 3, 7, and 10 list the mailing date, certified mailing number, and the address listed on the article as indicated by the Division's records. This information is consistent with the information contained in the certified mailing record. Boxes 11-14, and 16 of the form have been completed by the delivery post office. Box 11 contains the postmark of the delivery post office and box 16 contains the initials of the postal employee who completed the form. Box 12 indicates that the article in question was delivered to the addressee. Box 13 states a delivery date of July 22, 1994. Handwritten under the heading "Address" in box 14 is "260 I-5". The delivery post office then returned the Form 3811-A as completed to the Division.

15. Following the issuance of the Conciliation Order dated June 9, 1995, petitioner filed a petition with the Division of Tax Appeals dated June 25, 1995. In his petition, petitioner stated, in part:

"I was audited by NYS Dept. of Taxation for not filing for my 1990 NYS/NYC income tax returns. I subsequently did so and filed for a refund for \$2042.55. I did not get a response for some time, and then I called them, and they subsequently sent me a notice for \$675.14, and said they had sent me a detailed explanation earlier. I wrote back saying I did not get a detailed explanation as they mentioned, would like one now and would contest their decision in conciliation conference. On receiving no reply I wrote another letter. After still getting no reply, for which I waited a year. I sent another letter demanding a conciliation conference, to which I got a notice (attached) that my request for conciliation conference has been denied as it is too late. It is also to be noted that New York State Department of Taxation has not tried to collect \$675.14 which they claim I owe them. I urge you that since my original letter was mailed in time, and noting facts above you decide that I am given an opportunity to present my case in front of conciliation conference." (Emphasis supplied.)

16. Petitioner subsequently transmitted a letter to the Division of Tax Appeals dated October 2, 1995, wherein he stated, in part:

"Affirm that I did not receive Statement of Proposed audit changes dated 5/2/94 from the NYS Department of Taxation.

Affirm that I mailed a request for conciliation conference after receiving Notice of Deficiency dated 6/13/94 within a week of receiving the same." (Emphasis supplied.)

17. Petitioner also sent a letter to the Division of Tax Appeals dated December 13, 1995, which stated, in part:

"The Notice of Deficiency (L008742116) states 'The original notice sent to you on 05/02/94 showed the detailed computation of additional amount due.' Therefore, Notice of Deficiency cannot be held as accurate until the notice sent on 05/02/94 is proved. Moreover, Notice of Deficiency cites the notice of 05/02/94 as original notice, and therefore can only substantiate what is contained in notice of 05/02/94. Therefore, it is important that the counsel prove that notice of 05/02/94 was sent and received.

I reaffirm that I sent a letter regarding Conciliation Conference before 09/11/94, as well as I did not receive the notice of 05/02/94. Further, I affirm that I did not receive the three collection letters allegedly sent by Department of Taxation on 11/25/94, 01/26/95 and 03/27/95. The reason proof of these is important is that it is impossible for that many items of correspondence to be lost in the mail, and if it can be shown that the Department of Taxation is falsely stating such, then I could prove tax fraud on their part" (Emphasis in original.)

18. Petitioner has raised no dispute in this case that the address listed for petitioner on the subject notice was in any manner incorrect or was not petitioner's last known address.

CONCLUSIONS OF LAW

A. Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where the Division determines that there is a deficiency of income tax. This section further provides that such a notice "shall be mailed by certified or registered mail to the taxpayer at his last known address." Tax Law § 689(b) provides that a taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency within 90 days of the mailing of the notice of deficiency. Alternatively, Tax Law § 170(3-a)(a) allows the taxpayer to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Deficiency so long as the time to petition for a hearing in respect of such notice has not elapsed. Pursuant to this provision, then, petitioner had 90 days from the issuance of the subject notice to file a request for a conciliation conference.

B. Where a taxpayer denies receiving a notice and/or where the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. As noted previously, to be "properly mailed", a notice of deficiency must be mailed by registered or certified mail to the taxpayer's "last known address" (see, Tax Law § 681[a]). As noted previously, petitioner has raised no issue in this case that the address listed on the subject notice was in any way incorrect. In turn, where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (see, Matter of Katz, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (id.). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (see, Matter of Accardo, Tax Appeals Tribunal, August 12, 1993).

C. The mailing evidence required is two-fold: First, there must be proof of a standard procedure used by the Division for the issuance of notices of deficiency by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. LaFar, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of deficiency (see, Findings of Fact "4" and "12").

E. The Division has also presented sufficient documentary proof, i.e., the certified mailing record, to establish that the Notice of Deficiency at issue was mailed to petitioner on June 13, 1994. Specifically, this 44-page document lists sequentially numbered certified control numbers with corresponding names and addresses. No entries on this document have been deleted. All 44 pages of the certified mailing record bear a US Postal Service postmark dated June 13, 1994. Additionally, a postal employee circled the total pieces listed figure and signed page 44 of the certified mailing record to indicate receipt by the post office of all pieces of mail listed on the certified mailing record. Although not totally free from defects, this evidence is sufficient to establish that the Division mailed the subject Notice of Deficiency on the date claimed.

F. As alluded to above, the certified mailing record contains two defects which merit some discussion. First, the date of the Postal Service postmark is not legible on page 40 of the record, the page on which petitioner's name appears. The postmark is also not legible on five other pages (see, Finding of Fact "8"). The Tax Appeals Tribunal has held that an illegible postmark may result in a finding in favor of the petitioner on the issue of timeliness (see, Matter of Auto Parts Center, Tax Appeals Tribunal, February 9, 1995). In this case, however, this flaw is outweighed by: 1) the fact that the postmark date, June 13, 1994, is clearly legible on 37 of the 44 pages of the record; 2) the fact that the numeric date of 13 appears in the otherwise

illegible stamp on page 40; and 3) the statement in the Mahon affidavit that the pages of the certified mailing record are connected when the document is delivered to the post office and remain connected when the document is returned to the Division. Given these facts, it is reasonable to conclude that the date on the postmark appearing on page 40 of the certified mailing record is in fact June 13, 1994. The second defect is that the entry for "Total Pieces Received at Post Office" is blank. Similar defects have resulted in findings in favor of the petitioner in several cases (see, e.g., Matter of Turek, Tax Appeals Tribunal, January 19, 1995; Matter of Auto Parts Center, supra). In this case, this flaw is overcome by the following: 1) the certified mailing record contains no deletions; 2) the number indicating total pieces listed on the certified mailing record is circled directly above the signature of the postal employee; and 3) the Mahon affidavit states that this signature and the circling of the total pieces listed indicates that all pieces listed were received. Taken together, these three facts establish that all 480 pieces listed on the certified mailing record were received by the Postal Service.

G. Since the subject Notice of Deficiency was properly mailed on June 13, 1994, petitioner had 90 days from that date to file either a petition with the Division of Tax Appeals or a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). Petitioner's request for a conciliation conference was filed on May 4, 1995, and was therefore untimely.

H. Additionally, in this case the Division has submitted proof of actual receipt of the subject Notice of Deficiency by petitioner. Specifically, petitioner's receipt of the notice is established by the Division's introduction of the Postal Service Form 3811-A which confirms delivery of the notice to petitioner on July 22, 1994. Therefore, even assuming the Division's evidence of mailing was found to be insufficient to establish June 13, 1994 as the date of mailing, there is direct documentary evidence establishing actual receipt by petitioner on July 22, 1994. Using this later date of actual receipt (which is more beneficial to petitioner) as the triggering date for starting the 90-day period within which to protest the notices (see, Matter of Kimmey, Tax Appeals Tribunal, December 23, 1993; Matter of Avlonitis, Tax Appeals

Tribunal, February 20, 1992), it remains clear that the conciliation conference request filed on May 4, 1995 falls well beyond 90 days from this later triggering date.

I. Petitioner has not offered any evidence in response to the Division's motion. Indeed, petitioner has not provided any evidence that any protest to the subject notice was filed earlier than May 4, 1995. Petitioner's only claim is the bare assertion of timely filing set forth in the petition and in the subsequent letters sent to the Division of Tax Appeals. Clearly, this assertion has been overcome by the Division's evidence of the mailing of the subject notice and of the date of actual receipt of said notice by petitioner. Additionally, it is noted that petitioner's claims regarding his nonreceipt of the statement of proposed audit adjustment or certain collection letters (see, Finding of Fact "15", "16" and "17") are irrelevant since it is the Notice of Deficiency issued pursuant to Tax Law § 681(a) which may become an assessment subject to levy under Tax Law § 681(b). J. Section 3000.9(b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.9[b][1]) provides that a motion for summary determination shall be granted if the administrative law judge finds that it has been established sufficiently that no material issue of fact exists and that, therefore, the administrative law judge can, as a matter of law, issue a determination in favor of any party.

K. In the instant matter there are no material issues of fact. Accordingly, pursuant to the foregoing discussion and section 3000.9(b)(1) of the Rules, the Division of Taxation is entitled to summary determination in this matter.

L. The Division's motion for summary determination is hereby granted and the petition of Rakesh Jain is dismissed.

DATED: Troy, New York
February 22, 1996

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE